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Judge Gerhard Gesell's Ruling Refusing to Bar Post Series

Following is the ruling by U.S. District Court Judge Gerhard A. Gesell upholding his own preliminary finding that The Washington Post may continue to publish its series of articles based on the classified Pentagon study of the Vietnam war:

The Washington Post has certain papers from "The History of United States Decision-Making Process on Vietnam Policy," a 47-volume document, which was given an over-all "top secret" classification.

The United States Court of Appeals granted a temporary restraining order against publication by The Post and directed that this court hold a hearing today and make a determination by 5:00 p.m. with respect to the prayer of the United States for a preliminary injunction against further publication. This court was directed by the Court of Appeals to determine whether publication of material from this document would so prejudice the defense interests of the United States or result in such irreparable injury to the United States as would justify restraining the publication thereof.

The role of quasi-censor thus imposed is not one that any district judge will welcome to have placed on him by an appellate decision. It has been a doubly difficult role because the material to be censored is unavailable for there is absolutely no indication of what The Post actually will print and no standards have been enunciated by the Court of Appeals to be applied in a situation such as this, which is one of first impression.

Venturing onto this unfamiliar and uncongenial ground, the court has in public hearings and in the secret hearings that the court's directive necessarily required sought to carry out its responsibilities.

Voluminous material was submitted in affidavit form, testimony was taken from several witnesses at the session starting at 8:00 a.m. today, and the parties were heard in brief oral argument at conclusion.

The court finds that the documents in question include material in the public domain and other material that was "top secret" when written long ago but not clearly shown to be such at the present time. The court further finds that publication of the documents in the large may interfere with the ability of the Department of State in the conduct of delicate negotiations now in process or comtemplated for the future, whether these negotiations involve Southeast Asia or other areas of the world. This is not so much because of anything in the documents, themselves, but rather results from the fact that it will appear to foreign governments that this government is unable to prevent publications of actual government communications when a leak such as the present one occurs. Many of these governments have different systems than our own and can do this; and they censor.

The problem raised in this instance is particularly acute because two major papers are involved and the volume of the material leaked is great.

There has been some adverse reaction in certain foreign countries, the degree and significance of which cannot now be measured even by opinion testimony. No contemporary troop movements are involved, nor is there any compromising of our intelligence.

On the other hand, it is apparent from detailed affidavits that officials make use of classified data on frequent occasions in dealing with the press and that this situation is not unusual except as to the volume of papers involved.

The Court of Appeals apparently felt that the question of irreparable injury should be considered; that [illegible] weigh the equities of the situation in the traditional manner; and this court has attempted to do so. This requires a word with respect to the classification process.

There is no showing that in this instance there was any effort made by the government to distinguish "top secret" and other material, to separate the two, or, indeed, to make any effort once the publication was completed, to determine the degree, the nature or extent of the sensitivity which still existed in 1968 or for that matter exists at the present time.

At the close of the argument today, the government stated it was engaged in declassifying some of the material and requested time to complete this process with the thought that permission would then perhaps be given to The Post to publish what is ultimately declassified out of the whole.

The volumes stretch back over a period well into the early forties. The criteria of "top secret" are clear; and the government has not presented, as it must on its burden, any showing that the documents at the present time and in the present context are "top secret."

There is no proof that there will be a definite break in diplomatic relations, that there will be an armed attack on the United States, that there will be an armed attack on an ally, that there will be a war, that there will be a compromise of military or defense plans, a compromise of intelligence operations, or a compromise of scientific and technological materials.

The government has made a responsible and earnest appeal demonstrating the many ways in which its efforts particularly in diplomacy will not only be embarrassed but compromised or perhaps thwarted. In considering irreparable injury to the United States, however, it should be observed that [illegible] the government are inseparable from the public interest. These are one and the same and the public interest makes an insistent plea for publication. This was represented not only in the eloquent statements of Congressman [Bob] Eckhart, which the court found persuasive, speaking on behalf of *amicus curiae,* but it also is apparent from the context in which this situation presents itself.

Equity deals with realities and not solely with abstract principles. A wide-ranging, long-standing and often vitriolic debate has been taking place in this country over the Vietnam conflict. The controversy transcends party lines and there are many shades and differences of opinion. Thus the publications enjoined by the Court of Appeals concern an issue of paramount public importance, affecting many aspects of governmental action and existing and future policy.

There has, moreover, been a growing antagonism between the Executive branch and certain elements of the press. This has serious implications for the stability of our democracy. Censorship at this stage raises doubts and rumors that feed the fires of distrust.

Our democracy depends for its future on the informed will of the majority, and it is the purpose and effect of the First Amendment to expose to the public the maximum amount of information on which sound judgment can be made by the electorate. The equities favor disclosure, not suppression. No one can measure the effects of even a momentary delay.

Given these circumstances, the court finds it is still in the same position that it was in when it denied the request for a temporary restraining order. There is presented the raw question of a conflict between the

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First Amendment and the genuine deep concern of responsible officials in our government as to implications both immediate and long-range of this breach of confidentiality.

In interpreting the First Amendment, there is no basis upon which the court may adjust it to accomodate the desires of foreign governments dealing with our diplomats, nor does the First Amendment guarantee our diplomats that they can be protected against either responsible or irresponsible reporting.

The First Amendment in this case prohibits a prior restraint on publication. Accordingly, on the issue of likely success on the merits which is presented in any preliminary injunction application, the court has concluded, there is no likelihood of success.

There is not here a showing of an immediate grave threat to the national security which in close and narrowly defined circumstances would justify prior restraint on publication.

The government has failed to meet its burden and without that burden being met, the First Amendment remains supreme. Any effort to preserve the status quo under these circumstances would be contrary to the public interest. Accordingly, the government's prayer for a preliminary injunction is denied.

I have signed an order to that effect in order to facilitate appeal by the United States. I will state now on the record that the court will not under any circumstances grant a stay.

You may file this.

I wish to again thank counsel in the case.

Kevin T. Maroney (government counsel): Would Your Honor grant us a stay of the order dissolving the restraining order to permit us time to go to the Court of Appeals?

Judge Gesell: I will not grant any stay. You have 20 minutes. I am sure they are waiting for you upstairs.